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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of
Telecommunications Services
Inside Wiring
Customer Premises Equipment

CS Docket No. 95-184

In the matter of
Implementation of the Cable
Television Consumer Protection
and Competition Act of 1992
Cable Home Wiring

MM Docket No. 92-260

**COMMENTS OF AMERITECH
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

ALAN N. BAKER
Attorney for Ameritech
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196
(847) 248-4876

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Summary

Ameritech New Media, Inc., supports the Commission's proposed rules changes for cable inside wiring installed in multiple dwelling unit buildings by multichannel video programming distributors. For the most part, the proposed rules will serve to promote competition and customer choice in a marketplace dominated until recently by monopoly suppliers.

However, Ameritech is troubled that in some respects the rules still do not go far enough. In particular, the rules contain a proposed exemption that would say that the rules do not apply whenever the incumbent provider has some "legally enforceable right to remain on the premises against the wishes of the entity that owns the common areas of the MDU." Ameritech is concerned that this exemption, if allowed to apply to future agreements, will allow incumbent providers to preserve themselves from the inroads of competition almost indefinitely, since they will henceforth be well aware that in the absence of any long term agreement the Commission's new rules will apply.

Accordingly, in order to guard against this possibility, the Commission should adopt the rule it has tentatively proposed to apply to

future contracts, which would require ownership of cable facilities to pass to the owner of the building. However, Ameritech proposes that the rule be modified to permit short-term commitments for non-exclusive access to the building's occupants in order to permit the original costs of the cable to be recouped from a stream of revenue from cable users. Under Ameritech's rule, perpetual cable rights would be discouraged, while the cable operator's investment in the cable would still be protected by the opportunity for competitive revenues.

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Ameritech New Media, Inc. (hereinafter "Ameritech")¹ supports and applauds the changes proposed by the Commission in its Further Notice of Proposed Rulemaking released August 28, 1997 (hereinafter "Notice") pertaining to cable inside wiring installed in multiple dwelling unit ("MDU") buildings by multichannel video programming distributors ("MVPDs"). Generally, the proposed new rules will tend

¹ Ameritech New Media, Inc. is a subsidiary of Ameritech Corp. It began operation as a competitive cable operator in June 1996 and currently serves over 30 communities in the Chicago, Detroit, Cleveland and Columbus area markets.

to promote competition and customer choice in the presently monopolistic market for multichannel video distribution.

Accordingly, the present Comments will for the most part be confined to suggesting minor refinements and improvements in the operation of the new rules, as well as responding to some specific questions the Commission has posed. However, Ameritech also will show that the proposed waiting period of sixty days while incumbent providers hem and haw about what to do about unit-by-unit inside wiring is far too long and will thwart vigorous competition. Also, Ameritech believes that the proposed exemption for pre-existing "legally enforceable rights" should not be carried forward into new agreements. Ameritech also believes the Commission should adopt a new rule governing future contracts for the installation of inside wire, although Ameritech's modifications should be included.

I. The Proposed Unit-by-Unit and Building-by-Building Processes Are Too Slow To Permit Vigorous Competition.

Central to the Commission's rule for the unit-by-unit disposition of home run wiring and home wiring is the proposal (Notice, ¶ 39) that a MVPD that receives a sixty-day notice from the MDU owner must, within thirty days, make a single election, applicable to the entire building, whether it will remove, abandon, or sell its inside wire. If it elects to sell, an additional thirty days is allowed for the negotiation of the price.

Ameritech supports the main features of this rule, including the proposal to allow the MDU owner or alternative provider to act as the user's agent for the purpose of terminating the user's service with his or her former provider. However, Ameritech suggests that the time frame allowed for this process of notice and negotiation is entirely too generous and will result in lengthy delays that will heavily dampen the lively spark needed to ignite vigorous unit-by-unit competition. Incumbent providers plainly do not need such a long period of time to make up their minds about inside wire. Indeed, under the Commission's rules that already exist, if the occupant of a single-family home calls to cancel cable service, the incumbent is compelled to make its election while the caller is still on the line. But under the new rule, if the caller happens to be the landlord of a two-flat MDU, the incumbent provider gains a whole month of equivocation and still another month for price negotiation. There is nothing to justify such vastly different time periods. Even if it is granted that the incumbent's choice might be slightly more complex in the case of a larger building, still that choice will be made simpler by the fact that different choices can't be made for different units. So even if the incumbent is unable to give its answer during the initial contact with the MDU owner, there is still no reason why its election could not be expected in a day or two. Otherwise the alternate provider's sales force, after finally getting their foot in the landlord's door, will need to take a two-month vacation before

turning their efforts toward the tenants — certainly not the best way to follow up on hot sales leads. Meanwhile, of course, the incumbent, while feigning an agony of prevarication over its choice of selling, removing, or abandoning, will actually be using the available time to hustle the tenants feverishly in an effort save their business, profoundly thankful that the landlord had to give so much advance warning before any competition could actually *happen*. The excessive time periods allowed by the rule will thus serve only to deaden the lively unit-by-unit competition that might otherwise occur.

The same considerations, of course, apply to the even longer period (ninety days) that the rule allows the incumbent in the case of building-by-building dispositions.

In sum, the rules as proposed allow the incumbent provider entirely too much time to wallow in its indecision. The competition it will promote will be a competition of lethargy and delay, not the dynamic competition that end users demand. Ameritech submits that the Commission should cut back the rule's time limits sharply.

II. The Commission Should Establish Additional Guidelines To Determine the Sale Price for Inside Wire.

In addition, in cases where the incumbent MVPD elects to sell its home run inside wire, either on a building-by-building or unit-by-unit basis, the Notice (at ¶¶ 37 and 40) states that the Commission's preference is for the parties to negotiate the sale price, but also asks for

comment on “whether market forces would provide adequate incentives for the parties to reach a reasonable price” or whether, on the other hand, the Commission should establish some “guidelines, a default price, a general rule or formula” (¶ 37). Ameritech submits that even though the parties will be operating under the conditions stated by the Commission in ¶¶ 38 and 40 of the Notice,² in all likelihood they will often be unable to negotiate a price, particularly since the incumbent provider will be motivated to delay the process in the hopes of winning back the business of tenants who are inclined to stray. Accordingly the Commission ought to refer to the general guideline of six cents per foot that currently applies to the sale of inside wire in single-family premises.

III. Incumbent Providers Who Elect To Remove Their Wiring and Then Abandon It Should Be Penalized.

In the NPRM (at ¶ 36), the Commission seeks comment on whether to adopt penalties for incumbent providers who initially elect to remove their home run wiring and then decide to abandon it, putting the alternative service provider to the burden and expense of installing a second set of home run wires unnecessarily. Ameritech supports the imposition of such penalties and proposes that, in order to

² Under those conditions, if the parties are unable to agree on a price, the incumbent would be required to choose between abandonment or removal.

provide a sufficient deterrent to such conduct, the penalty be established as three times the amount actually expended by the alternative provider in installing the second set of home run wires, to be paid to the alternate provider.

IV. Alternative Service Providers Should Have Access to Existing Molding Or Conduit.

In ¶ 83 of the Notice, the Commission proposes to permit alternative service providers to install their home run wiring within existing molding or conduit, even over the incumbent provider's objection, where there is room in the molding or conduit and the MDU owner does not object. Ameritech supports this proposed rule and agrees with the tentative conclusion that such a rule would promote competition and consumer choice and would not constitute a taking of the incumbent provider's private property without just compensation under the Fifth Amendment.

V. The Exemption for Existing Contractual Rights Should Not Apply to New Agreements.

Ameritech is disappointed that the rules the Commission is proposing for the disposition of home run wiring do not apply in all cases. Instead, the language that is proposed in 47 C.F.R. § 76.804 will apply to incumbent cable operators only when "an MVPD owns the home run wiring in a multiple dwelling unit building ('MDU') and does not (or will not at the conclusion of the notice period) have a legally

enforceable right to remain on the premises against the wishes of the entity that owns the common areas of the MDU.”

Ameritech submits that this exception to the scope of § 76.804 is far too lenient. However, in view of the Commission’s undertaking to deal with this subject in future stages of these proceedings (Notice, ¶ 3), Ameritech temporarily accepts this limitation insofar as it applies to enforceable rights that incumbent providers may have heretofore acquired.

However, the exception under § 76.804 also appears to allow the negotiation of *brand-new* long-term agreements for home run wiring that will enable incumbent cable operators to evade the Commission’s new MDU disposition rules for many years to come, both as to buildings not yet built as well as those built long ago but never before put under contract. To this extent, the exemption appears partially inconsistent with the rule the Commission is proposing to adopt that would require the ownership of inside wire under future agreements to be surrendered to the MDU owner.³ Since that rule is being considered separately, and therefore might never be adopted, or might be delayed, Ameritech believes that the currently-proposed exception for “legally enforceable rights” should be limited to agreements that already exist.

³ *I.e.*, the rule proposed in ¶ 85 of the Notice. Ameritech argues in Part VI of these Comments that such a rule should indeed be adopted.

VI. Ownership of Inside Wire in Future Installations Should Be Transferred to the MDU Owner.

The Commission has also sought comment (Notice at ¶ 85) on whether it should adopt a rule requiring video service providers, in the future, to transfer ownership of home wiring and home run wiring to the MDU owner and, if so, how the price for such wiring should be determined. It is suggested that such a rule would increase competition and consumer choice in future installations.

Ameritech submits that such a rule would indeed promote competition and ought be adopted. However, there is no need for the Commission to establish any rule for the valuation of cable installed under such circumstances. First of all, the MDU owners may be unwilling to pay for the cable no matter how low the price, making the issue of valuation wholly moot.⁴ Second, MVPDs could still be induced to install the cable and transfer it to the MDU owner so long as the MDU owner's ownership of the cable was not absolute, but subject to the installing MVPD's right, for some term of years, not to be evicted from its free right of access to serve the tenants of the building. This latter

⁴ The record already reflects only a lukewarm commitment to cable competition on the part of MDU owners. After all, if those owners were unwilling, on the grounds of inconvenience or unsightliness, to accommodate a second home run wire that would have been installed for free, it is even less likely that they would put up any money of their own for the sake of potential competition among MVPDs. To look at it from a realistic MDU owner's point of view, the MDU owner might well invest in cable inside wire only to find that no potential MVPD competitor ever appeared to serve the occupants.

right would *not* be the same type of *exclusive* right to use the cable that is commonplace today, but merely a guarantee that the MDU owner would not grant any such exclusive right to some *other* MVPD using the same cable that was installed by the first MVPD. Ameritech predicts that even if MVPDs are denied the right to *exclusive* use of the cable, they will still be motivated to install cable in new buildings at no charge to the MDU owner in return for the undisturbed *non-exclusive* opportunity to serve the tenants.⁵

This rule would have several advantages. First, the problem of anticompetitive "perpetual" contracts would be substantially done away with. At the same time, however, allowing the MVPD to negotiate to obtain a fixed minimum term as the non-exclusive provider would protect the MVPD from outright confiscation (as might be the case if the MDU owner owned the inside wire outright from the beginning and changed all the tenants to another MVPD after only a week). Instead, the MVPD over the life of the agreement will have an adequate opportunity to recoup its investment in the cable from the revenues paid by the tenants for cable services. Of course, it might lose some of the tenants to competition. Yet again, no competitor might

⁵ In fact, if it is made clear from the beginning that the first MVPD does not become the *only* provider that will be allowed access to the MDU's occupants, and will be prohibited from seeking to obtain such an exclusive right by contract, the same pro-competitive result is attained without regard to whether it is the MDU owner or the MVPD that is regarded as the legal owner of the cable.

ever appear. Neither of these outcomes is for certain, but then in competitive industries there are no guaranteed returns, only opportunities.

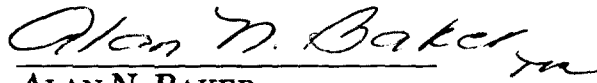
Thus, the Commission should adopt a rule for future contracts for the installation of cable inside wiring in new MDU buildings substantially as follows:

1. The MVPD must dedicate ownership of the inside wiring to the MDU owner free of charge;
2. The MVPD may not require the MDU owner to grant to the MVPD the exclusive right to use the inside wire; and,
3. The MVPD may require the MDU owner to agree that for a term of years no exclusive right to serve the building's occupants will be granted to any other MVPD, unless the second MVPD is required to pay the first MVPD 100% of the first MVPD's original cost to install its cable inside wire.

Because this rule would not result in any exclusive right of the MVPD to remain on the premises over the MDU owner's objection, the Commission's usual unit-by-unit MDU disposition rules (*i.e.*, those

currently under consideration) would apply whenever a competitor appeared to compete on a unit-by-unit basis. Ameritech submits that this is the rule that the Commission should adopt to apply to future contracts for cable wiring in multiple dwelling units.

Respectfully submitted,



ALAN N. BAKER
Attorney for Ameritech
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196
(847) 248-4876

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